

JULY 31. 1764.

[Lord Coalston Reporter.]

INFORMATION

F O R

76

Veronica Pringle, Relict of the deceast
Mark Pringle of *Crichton*, and for her
three sons, *Robert*, *Andrew*, and *Mark*
Pringles, Defenders;

A G A I N S T

John Pringle of *Crichton*, Esq; Pursuer.

THIS case, which is to be reported by Lord Coalston, respects the validity of an heritable bond of provision, and the effect of certain testamentary deeds, executed by the deceast *Mark Pringle*, Esq; which bond of provision the pursuer, his eldest son and heir, says, ought to be reduced, because of its being granted by his father when on death-bed; and which testamentary deeds, he says, are ineffectual, in so far as they are made to convey his father's moveable estate to the defenders, to the prejudice of his obtaining relief from payment of the moveable debts; and that one of them, viz. a codicil, being executed without a date, is to be presumed to have been done on death-bed, and of consequence, cannot have any effect to his prejudice, as the heir of his father. Nature of action.

The said *Mark Pringle* deceased, was for a considerable time his Majesty's Consul at *St. Lucar* in *Spain*, where, by his industry and attention to trade, and in the year 1737, by the advice of his friends, purchased the estate of *Crichton* in the county of *Mid Lothian*, of the annual value of 850 l.; but his fortune was not sufficiently large to enable him to pay the price, which obliged him to borrow large sums in this country. Mr. Pringle acquires the estate of Crichton.

A

Mr.

Mr. *Pringle* was twice married; by his first wife he had issue, a son who is the pursuer, and two daughters, *Margaret* and *Violente*; and the defenders are the children of the second marriage, and their mother.

Mr. *Pringle*, whilst in this country and about to return to *Spain*, executed a disposition of the estate of *Crichton*, in favours of his son the pursuer, wherein he reserved his own liferent; and it further bears, "with provision always, likeas, it is hereby specially provided and declared, *that the said John Pringle and his fore-saids, shall be holden and obliged, as by acceptation hereof, they bind and oblige them, their heirs and successors whatsoever, to satisfy and pay the provisions made and granted by me, in favours of Misses Margaret and Violente Pringles my daughters, and John Pringle my nephew; conform to bonds of provision already granted, or that shall be granted by me to them, or in favours of any other person or persons at any time hereafter; and generally, all and sundry my debts, gifts, legacies and others whatsoever, that I shall be owing the time of my decease, upon whatever cause or occasion.*"

The disposition likewise contains this other clause: "And likewise, reserving always to myself my liferent right, during all the days of my lifetime, of the whole lands and others above disposed; with full power to me, by myself alone, *at any time in my lifetime, without consent of the said John Pringle, and his fore-saids, to burden and affect the said lands and others, by heritable bonds or otherways, with such debts, gifts and provisions, as I shall think fit; and to sell and dispoise the same in whole or in part, and to revoke, alter, and innovate these presents at pleasure.*"

Mr. *Pringle* went to *Spain* soon after executing this disposition; and in the year 1751, the pursuer, his son being desirous to be entitled to vote for a member of parliament in *Mid-lothian*, it was proposed to Mr. *Pringle*, that the pursuer, for that purpose, should expedite a charter under the Great Seal upon the procuratory in the fore-said disposition, and which Mr. *Pringle* having agreed to, upon being assured, that it would not hurt his powers over the estate, the matter was carried into execution; and the pursuer was infeft, and his sasine duly recorded.

Before Mr. *Pringle* went to *Spain*, he appointed a factor for uplifting the rents of the estate; and it was settled, that the pursuer was to have 150 *l.* out of those rents, as a present maintenance;

and



and that the residue of the rents were to be applied for payment of the annual rents of debts, and towards extinction of the capitals, which then amounted to 8300 *l. sterling*, as appears by an account holograph of the pursuer's agent, who was the factor upon the estate, and that besides 3000 *l.* in two bonds of provision, granted by Mr. *Pringle* to the pursuer's two sisters; afterwards reduced to 2000 *l.* by the death of the younger sister, within year and day of her marriage: But that plan of management was not followed out; the pursuer intromitted with large sums over and above his allowance, and large sums were applied for building farm-houses, and otherwise meliorating the estate; so that out of the rents, crops 1747 and 1754, and intervening crops, almost nothing was applied towards payment of the debts, when Mr. *Pringle* returned to *Britain* in the year 1755, and came himself to have use for part of his rents. However, Mr. *Pringle*, when in *Spain*, remitted 3300 *l.* which with 900 *l.* due to him in this country, and the portion of 2000 *l.* received upon the pursuer's marriage, were all applied towards extinction of the debts, and reduced them in the year 1755, to the moderate sum of 4100 *l. sterling*.

That upon the pursuer's marriage, his father did execute a deed, wherein he renounced his liferent and the other faculties reserved to him by the disposition 1748, in so far as regarded the lands of *Doupie-mill*, and other parts of the estate; and the deed contains the following clause, "But reserving always to myself, my liferent-right of the whole of the lands and barony of *Crichton*, and my said power and faculty of selling and disposing, or burdening and affecting the said whole lands and barony of *Crichton*, excepting only the said lands of *Doupie-mill*, &c. hereby renounced, as fully and freely to all ends and purposes, as if these presents had never been granted."

Mr. *Pringle* being old, gave up his consularship, and came to *London* to reside for the remainder of his days; and finding there, that his funds, independent of the estate in *Scotland*, were not sufficient for making suitable provisions to the defenders, he executed the following deeds.

Upon the 4th of *March* 1758, he executed a testament, wherein he bequeathed to the pursuer the sum of 2500 *l. sterling*, due to him by Don *Francisco Urgate*, late of *Cadiz* in *Spain*, merchant; and also his effects in *Spain*, which he had left in the hands of *David Hodge* merchant in *St. Lucar*, to be applied to the payment of a considerable debt, which he owed to *Isidac de la Roche*, merchant

in

March
1758.

Mr. Pringle
makes a tes-
tament,
wherein he
burdens the
pursuer with
the payment

his due in
nd. in *St. Lucar*; and he empowers the pursuer to settle accmpts with Mr. *Hodge*, and ordains him to pay any balance that may be due, out of the real estate in *Scotland*, in consideration of the legacy given him; and then follows this clause: "And further, "in consideration of the said legacy, I hereby direct and appoint "the said *John Pringle* my son, to pay out of my said real estate "in *Scotland*, all bonds, gifts, annuities and others, which I "have granted, or shall grant, by virtue of the powers and faculties reserved to me, by the disposition of my said real estate "aforesaid, to my said son, with the payment whereof he is "chargeable by the disposition aforesaid: And I ordain, that no "part of the said debts shall affect this my personal estate; and "in case of any pursuit, demand and charge brought against my "said wife, she shall have immediate recourse against my said "son, and shall be relieved of all such claims and bonds due by "me in *Scotland*."

By the testament, Mr. *Pringle* bequeathed the residue of his moveable estate to his wife *Veronica Pringle*, one of the defenders, in trust, for the following uses: 1mo, To pay his funeral expenses, and all debts that were or should be owing by him in *London*, at the time of his death. 2do, To pay 1000 *l. sterling* to his youngest son *Mark Pringle*, at his marriage or majority, with interest from the time of his, the testator's death. The sum in the event of *Mark's* death, to be divided between his two brothers, *Robert* and *Andrew*; and in the event of their death, to belong to the pursuer. 3tio, The remainder of the personal estate, to be liferented by his wife, and upon her death to be enjoyed by her children, in such proportions as she shall have appointed by a writing under her hand. 4to, In the event of Mrs. *Pringle's* entering into a second marriage, the personal estate to be vested in trustees, for behoof of her children; and it is declared, that if she fail to name trustees, in such event her neglect should infer a forfeiture of her interest in the personal estate; and there are guardians appointed for *Mark*, in the event of such second marriage.

rch 29.
8. Upon the 29th of the said month of *March*, he executed an heritable bond of annuity to his wife, for 50 *l.* and an heritable bond in favour of his two sons *Robert* and *Andrew*, for 1000 *l.* each, with a clause of accretion, and a provision of the monies reverting to the pursuer, in the event of their death; and upon these deeds infeftment was taken on the estate of *Crichton*.

Mr.

Mr. *Pringle* at the same time, in virtue of the powers reserved to him in the disposition of the year 1748, execute a new disposition of the lands of *Crichton*, in favours of the pursuer; and wherein he calls to the succession, his sons by his second wife, in preference to the pursuer's female issue; but without any restraint or limitation whatever upon the pursuer, the destination being simple; and by the deed, the disponees become bound by their acceptance, "To pay the provision made and granted by me, in favours of *Veronica Renny* my spouse, *Margaret Pringle* my only daughter, the said *Robert, Andrew, and Mark Pringles* my sons, and *John Pringle* my nephew, conform to bonds of provision already granted, or that shall be granted by me to them."

sum of 2000
to his sons,
Robert and
Andrew.

Mr. Pringle
of new dis-
pones the ba-
rony of Crich-
ton to the
pursuer.

The disponees are also burdened with the payment of all other debts, legacies, &c. and the deed also contains the following clause, "With full power to me, myself alone, at any time in my lifetime, without consent of the said *John Pringle*, or my other heirs before mentioned, to burthen and affect the said lands and others, by heritable bonds or otherways, with such debts, gifts and provisions, as I shall think fit."

The personal estate which Mr. *Pringle* had settled by his will, as a fund for his younger children, and an additional maintenance to his wife, in the event of her surviving him, came to be greatly diminished by various occurrences:—Mr. *Pringle* was social and benevolent, and in his state of retirement at *London* from business, was anxious to have the company of his friends, which they indulged him in, and his house was much frequented, which occasioned a high annual expence. An annuity of 200 *l.* which he got an obligation for, upon giving up his consulship, dropt; a debt of 900 *l.* due to him in *London*, became desperate by the insolvency of the debtor: The pursuer had use for, and got more than his proportion of the rents of the estate, so that truly Mr. *Pringle* came soon to discover a considerable alteration in his circumstances; and on this account he executed a codicil, wherein he altered the will in two respects, but confirms and ratifies it as to every thing not altered; 1st, He bequeaths the *Spanish* debt of 2500 *l.* due by *Don Francisco Urgate*, to his wife in trust, to be divided equally between the pursuer and her children, share and share alike. 2^{dly}, Upon a narrative of his having settled with *La Roche*, and paid the debt due to him, he orders any sum that might be due by *David Hodge* to him, to be liferented and divid-

Mr. Pringle
makes a co-
dicil to his
will, where-
in he ratifies
and confirms
it, unless in
so far as
thereby al-
tered.

ed by her in the same manner, as the residue of the personal estate in the principal testament.

This codicil bears no date, but it has been proved in this action, to have been executed upon the 13th day of *August* 1760, above ten months before Mr. *Pringle's* death, and when he was in perfect health, and sound judgment and memory, of which notice will hereafter be taken.

The pursuer came to *London* soon after the execution of this codicil, to visit his father; and Mrs. *Pringle* flatters herself, that he will do her the justice to acknowledge, that she informed him of the codicil, and of the alteration thereby made upon the will, with which he had also been made acquainted: And that to avoid all reflections against her, of having used any improper influence, she frequently advised and recommended to him, to speak to his father upon the subject of the settlements which had been made, that there might remain no room for blaming her, in case he should come to think they were too favourable for her and her children; and that upon these occasions, he not only once, but often declared his being satisfied with what was done, and that he thought his father had done no more than what he ought to have done.

The pursuer will also well remember, that when he was at *London*, he was apprised of his father's intention, to secure his son *Mark's* provision, by an heritable bond upon the estate, partly because the recovery of the *Spanish* debt was still doubtful, tho' measures were then in agitation for the recovery thereof, and partly because of the loss of the aforesaid 900 *l. Sterling* of Mr. *Pringle's* funds; and of this resolution of Mr. *Pringle's*, the pursuer not only approved as an act of justice, but said, that when he went to *Scotland*, he would send up a scroll of a proper bond to be executed.

The pursuer went to *Scotland*; but his father being in a declining state, and anxious to have the bond made out, it was (before the pursuer's intended scroll could have reached *London*) wrote by a gentleman in *London*, and was execute by notaries upon the 25th day of *May* 1761, in presence of a cousin german of the pursuer's, and several other persons, who are witnesses.

And by the bond, which proceeds upon a narrative of the reserved faculty in the disposition 1748, Mr. *Pringle* becomes bound to pay to his youngest son, *Mark*, the sum of 1000 *l. Sterling*, at the first term after his majority, with annual rent from the first
term

term after the granter's death : And it is provided, that in the event of *Mark's* death, the money shall devolve upon his brothers, *Robert* and *Andrew*, and that in the event of their death, it shall belong to the pursuer.

As this bond of provision was intended to come in place of the 1000 *l.* formerly provided to *Mark*, the payment of which was understood to depend upon the recovery of the *Spanish* debt ; so, agreeable to what was resolved upon when the pursuer was in *London*, and that justice might be done him, his father did execute a second codicil, wherein, after reciting the heritable bond of provision, which he desires may be ratified and confirmed by the pursuer, his eldest son, he bequeaths to the pursuer 1000 *l.* to be paid when recovered, free of all costs and charges, and directs the residue to be divided, as ordered in the first codicil. At the time of the execution of the will, in a second codicil.

Mrs. *Pringle* wrote the pursuer a full account of all that was done, and the bond was put into the hands of one Mr. *Hodge*, who was about to set out for *Scotland*, for the purpose of the pursuer's completing it by infestment, and which the pursuer readily agreed to. Pursuer formed what had been done and the land by Hodge.

It appears, that Mr. *Hodge* arrived in *Scotland* about the beginning of *June* ; and in a letter to Mrs. *Pringle*, dated the 11th of that month, he gives the following account of what passed between the pursuer and him : “ Mr. *Pringle* came to town upon *Sunday* ; we supped together, and talked over the affair of settling *Markie*, that is to say, in infesting him in the estate in the manner you desire, to which he had not the least objection ; and it remained, to have a meeting with Mr. *Mitchelson*, to get him to have the bond registrate, and make infestment : We met on *Monday*, near one of the clock, when the bond was sent to be registrate : The post came in about two o'clock, and gave me the disagreeable news of Mr. *Pringle's* death : I then went to look for Mr. *John Pringle*, and found him with Mr. *Mitchelson* ; he still promised that *Markie* should be infest as before.” Then he tells, that he is obliged to go to *Glasgow*, and adds, “ You have not the least reason to be uneasy at this, as I think Mr. *John Pringle* too much a man of honour, to go back of his word.” Mr. Hodge's letter, an account of what passed between the pursuer and him.

Mr. *Hodge* was not mistaken ; the infestment was soon after taken by the pursuer's doer as notary ; and when Mr. *Pringle* was at *Crichton*, the company who were witnesses to the solemnity, dined with him ; it was considered as his act, reported as such by Mr. *Hodge* to Mrs. *Pringle*, who returned her grateful thanks in

a letter, dated 30th June 1761, directed to the pursuer, in which she writes, " I had a letter from Mr. *Hodge* last night, wherein he " tells me you granted *Markie's* infestment with great chearfulness : " Indeed I was not at all surpris'd with the news, as it was no " more than expected from your generosity and goodness of heart, " &c."

The pursuer, after his father's death, appeared to be dissatisfied with the heritable bond of provision granted to *Mark*, and the codicil which takes from him so much of the *Spanish* debt : But the defender Mrs. *Pringle* had it not in her power to give him relief : For her children, who are all minors, were the persons chiefly interested. At the same time, he will do her the justice to acknowledge, that she was willing to do all in her power to prevent a law-suit ; for that she offered, and even pressed to have the matter submitted to a person very nearly connected to himself ; from whose determination great satisfaction was to be expected by all parties, as it would be agreeable to the rules of law and justice ; but this was not thought expedient, and she had it not in her power to do more.

com- The pursuer, after deliberating for some time what part to act, d. thought proper to bring the present action ; wherein he concludes for reduction of *Mark's* heritable bond of provision, and of the testament and codicils ; and to have it found and declared, that the defender Mrs. *Pringle* was bound to relieve him of all the personal debts of his father ; or, at least, to convey to him the *Spanish* debt.

The pursuer, in the out-setting of the cause, judicially restricted the reductive part of his libel to the bond of provision and codicils ; and appears to have argued the cause, as if he only meant to have the bond set aside, and the moveable estate to stand upon the footing of the testament, without demanding further relief of the moveable debts, than what he can operate by the *Spanish* debt being found to belong to him : However, it is to be wished he would be explicate upon this : For if he means to go further, it would be declaring his intention of cutting his brother *Mark* out of his provision altogether : For he knows well, that the executry-funds, independent of the *Spanish* debt, will not even be sufficient to pay *Mark's* provision ; and which may have an influence, both in law and justice, in this case, if the court should be of opinion, that the pursuer is intitled to relief of debts out of the executry-funds.

In

In the course of the proceedings, it was pleaded for the pursuer, that as the first codicil had no date, it must be presumed to have been executed by Mr. *Pringle* when on death-bed: And, for obviating of this plea, the Lord Ordinary allowed the defenders to prove, that the deed was executed by Mr. *Pringle* when in *liege poustie*.

In consequence of this, *George Lewis-Scott*, Esq; one of the commissioners of his Majesty's excise in *London*, was examined, who deponed, "That, from a memorandum taken by the deponent, which he has now in his custody, he has occasion to remember distinctly that he visited and dined with Mr. *Pringle* deceased, late of *Crichton*, upon the thirtieth day of *August* 1760, at *Low-Layton* in *Effex*: That the deponent then wrote a codicil to the will of the said *Mark Pringle*, which contained no date, to the best of the deponent's remembrance: That the deponent saw the said *Mark Pringle* sign the said codicil, of that date, in presence of this deponent, and *William Cort*, servant to the said *Mark Pringle*, who likewise signed the same as witnesses."

Proof of the first codicil being executed in liege poustie.

This gentleman will probably be known to many of your Lordships; and as the utmost credit will be given by every person that knows him, to what he either says or swears; so, there is no doubt of the codicil's having been executed upon the 30th of *August* 1760, which is near ten months prior to Mr. *Pringle's* death; and it is scarce necessary to add, that the witness has further deposed, that Mr. *Pringle* appeared to him to be "of sound mind, memory, and judgment, when he perused and signed the said codicil:" And which indeed is also deposed to by several other persons of character and knowledge, who had business to transact with him about that period.

It has been said for the pursuer, that the testimony of one witness can have no credit, however unexceptionable his character may be. To which the defenders answer, That the testimony of Mr. *Scott* is supported by strong and unerring circumstances, which, when joined to his testimony, amount to a legal and convincing proof.

It will be observed, that Mr. *Scott* has said, that *William Cort*, servant to Mr. *Pringle*, was a signing witness to the codicil, and which is proved to be the fact from the codicil itself.

Now, *Susanna Kingstoun* depones, "That when she was servant to the said deceased *Mark Pringle* of *Crichton*, in the year 1760, she knows that *William Cort* was likewise servant at that time

“ to the said *Mark Pringle*, in the station of a footman. Depones, “ That she remembers, that when Mr. *Pringle* and his family lived at *Low-Layton* in *Essex*, in the year 1760, Mr. *George Lewis-Scott* came and dined with Mr. *Pringle*, some time about the “ end of the summer that year, when the deponent believes he “ wrote some paper, or will, for Mr. *Pringle*: For on that occasion, the said *William Cort* having been called upon, returned, and “ told the deponent that he had signed witness to Mr. *Pringle*’s “ will. Depones, That Mr. *Pringle* and his family left *Low-Layton* upon the 4th *November* 1760; and that the said *William Cort* “ left Mr. *Pringle*’s service upon the 10th of *November* the said “ year. Depones, That on that day she saw the said *William Cort* “ write an accompt and receipt for his wages, and other particulars, which he signed; and which receipt, the deponent now “ exhibits, having received the same from the said *Veronica Rennie*, “ widow of *Mark Pringle* aforesaid; and the said receipt is marked and signed by the said commissioner and this deponent, as “ relative to this oath. Depones, That she knows the said *William Cort* went to *Ireland* about three months after he left Mr. “ *Pringle*’s service; and she has been informed he still continues “ there.”

The account referred to by this witness is produced, wherein *William Cort*’s wages, till the 10th of *November*, are stated and discharged; and as the accompt appears to be holograph of *William Cort*, who then left Mr. *Pringle*’s service, it is clear, that the codicil must have been executed prior to the 10th of *November* 1760, which is sufficient from barring reduction of the codicil, *ex capite lecti*.

As a charter had been expedite at the pursuer’s desire, upon the disposition 1748, and that the charter and sasine thereon had been produced, as his titles for carrying on the present action, the defenders took it for granted in the course of the argument, that he had accepted of the disposition: But this not being admitted by him, the Lord Ordinary did ordain the defenders to give in a condescendence of the facts and circumstances from whence they inferred the pursuer’s acceptance of the disposition 1748, “ Not only quoad the lands contained in the renunciation 1754, but also, “ quoad the lands of *Crichton*,” which was accordingly done. And as the condescence and answers will be printed and given into court with the informations, the defenders will beg leave to refer

to

to them, and not to doubt, but that your Lordships will be satisfied from what there appears, that the pursuer accepted of the disposition 1748, and will argue upon that supposition.

It may be proper further to observe, that in the course of the proceedings before the Lord Ordinary, the pursuer appears to have taken for granted, that the *Spanish* debt does bear interest, and that the sum does now amount to about 7000 *l. Sterling*.

In whatever manner this cause shall be determined, the defenders are extremely sorry that the pursuer is mistaken in this matter. The debt was due by a bottomry bond or obligation, and the payment depended upon the returning of a *Spanish* flotta from *South America* to *Spain*, and which did not return till the year 1753. So that, supposing interest to be due from that period, the sum would not be near so great as the pursuer seems to believe: But the fact is, as the defenders have been informed, that no interest can be recovered upon the debt, not only because the principal debtor is totally bankrupt, and that the only hopes of payment is from a surety in the obligation, against whom, or even against the principal debtor, the debt has never yet been proved, or a judgment recovered, altho' Mr. *Pringle* during his life, and his widow since his death, have done every thing in their power to get it done; but also, because, as the pursuers have been informed, no interest can be demanded before the courts of *Spain* upon such debts; and indeed, the defenders have the greater reason to believe this to be true, that in all the memorials which have been presented to the *British* ambassadors, or residents at *Madrid*, for obtaining justice in this matter, there is not the least insinuation of interest being due upon the debt.

It may appear surprising to your Lordships, that Mr. *Pringle*, or the defenders have never been able to get the debt proved, and a judgment against the debtors; but the fact certainly is so, and as that is known to the pursuer, it is unnecessary to suggest the reasons which have occasioned it, which are also known to him; and the defender shall only add further, that till lately, they never had the least hopes of any thing being recovered, and that even their latest information gives them no sanguine expectations of any thing being got.

These things being premised, the defenders shall now proceed to the argument in the cause: And the first question is, Whether the heritable bond of provision granted to *Mark*, which is admitted.

referred
for inf
ing the
suer's
tance
disposit
1748.

An acc
of the
nith de

First quest
to be conf
dered, is,
Whether
Mark's her

bond of ted to have been executed on death-bed, can, on that account, be
 tion can set aside by the pursuer?
 luced ex
 letfi?
 ument.

It has been admitted by the pursuer, that when a person dis-
 pones his estate to a stranger, with a reserved faculty to alter and
 burden, the exercise of such faculty on death-bed, cannot be set
 aside by the disponent accepting, or by the heir at law. The first,
 as he takes under the disposition, must take the right, with all its
 qualities; and the latter has no interest to challenge, as the dispo-
 sition excludes him.

On the other hand, it has been laid down as clear law by the
 pursuer, that where a person disposes his estate to his son and heir
alioque successurus, under such a faculty, the disponent who does
 not accept of the disposition, is intitled to set aside all death-bed
 deeds, in exercise of the faculty; because *nemo potest cavere, ne le-
 ges in testamento suo locum habeant*. And the defenders have no oc-
 casion to dispute this doctrine, for they apprehend, there has been
 a clear acceptance of the disposition 1748, and the proper quetti-
 on to be argued is;

Whether the pursuer, who has accepted of a disposition to his
 father's estate, bearing a reserved power to his father to burden it
 without his consent, "By heritable bonds or otherways, with
 " such debts, gifts and provisions, as he should think fit; and
 " wherein the pursuer becomes bound, by his acceptance, to sa-
 " tisfy and pay all bonds of provision already granted, or that
 " shall be granted by him," can set aside a bond of provision ex-
 ecuted on death-bed, in virtue of such reserved powers?

In the entry upon this question, it will not be improper to ob-
 serve, that Mr. Pringle was a younger son, who had only a small
 patrimony, and that he acquired his whole estate by his own in-
 dustry, and application to business: That he was under no obli-
 gation, by marriage contract, or otherways, to leave his estate,
 or any part of it, to the pursuer his eldest son: That he was ab-
 solutely *rei sue moderator et arbiter*, both in law and good reason;
 and, as all was the purchase of his own industry and merit, that
 if he had been guided by the sentiments of merchants in those
 countries, where he past the greatest part of his life, and had dis-
 tributed his estate with equality among his children, there would
 have been no cause to blame his conduct. That, when swayed
 by the customs of his native country, and a just esteem for his
 eldest son, he has given the bulk of his fortune to him, and only
 rational and reasonable provisions to his younger children; there
 is,

is, at least, no just reason to stretch the law, if doubtful, to enable him to take from the younger children, and their mother, any part of the rational and moderate provisions given to them; and this the rather, that the pursuer cannot say he was deceived by his father; for, in many letters he was told, that he need not expect the estate in *Scotland* free and unincumbered; on which account, many advices to œconomy were given. And, after all, it cannot be said, that he has burdened it to excess; for by the pursuer's own account, the debts including *Mark's* provision, and all the others, are only about 6000 *l.* which the defenders imagine to be a large computation, and yet is no extraordinary burden upon an estate, which, many years ago, yielded a rent of 850 *l. per annum*, and which, since that time, is much increased in its value.

The bond of provision falls to be supported in the apprehension of the defenders, upon this plain principle of law and reason, that the pursuer having accepted of the disposition, he cannot be allowed now to reject it, but must be bound by it in the same manner as if he was a stranger; and which principle is fortified in this case, by the infestment taken upon the bond: For altho' there is no evidence of the pursuer's having directed that to be done; yet, upon the whole circumstances of the case, particularly, *Mr. Hodge's* letter, your Lordships will be satisfied, that it was done by his approbation, and will be inclined to construct his conduct to be a homologation of the bond which had been granted.

The law of death-bed operates in favours of heirs only; but the pursuer, as to the estate of *Crichton*, cannot be considered as the heir of his father, for he has taken, and holds the estate under a special disposition, and must be subjected to every quality in that disposition, in the same manner as a stranger would have been. Lord *Bankton* lays down this in very express terms, in page 306th, *Vol. 2d.*, § 48th, where, treating of this subject, he says, " That if such dispositions, with reserved powers, are granted to strangers, the faculty may be exercised on death-bed, because the right is granted with such quality, and the heir of the granter is excluded by the disposition, and not by the exercise of the faculty; but if granted to the presumptive heir, he may reject the disposition, and reduce the exercise of the faculty, if done on death-bed, as being a device to elude the law of death-bed, *unless the heir has accepted of the disposition and possessed thereon, for then he is in the same case with extraneous disponees, and cannot bring under*

D

" challenge

" challenge the exercise of the faculty to his prejudice, tho' done on death-bed.

The author of the *Dictionary* has, *Vol. 1st*, page 215th, laid down this point as settled by two decisions, 22d of June 1670, *Douglas contra Douglas*; 16th of Decemer 1668, *Bricen contra Bricen*; and the substance of them is fairly taken down in these words. " A father disposed his estate to his eldest son, reserving power at any time during his life, to burden it with a certain sum: This power he exercised upon death-bed, which was found good against the dispositive, who was heir, seeing he had accepted and bruiked by the disposition, reserving this power to burden at any time during his life, which includes also death-bed."

It has been said for the pursuer, that the *ratio decidendi* in those cases, was the faculty's being limited to a special sum; but that is clearly a mistake, as will be evident from reciting the interlocutor of the court in one of these cases, as collected by Lord *Stair*. It is in these words; " The Lords repelled the defence, and found, that the reservation in the terms as it stood, did extend to burdening of the estate at any time the dispositive pleased, and was in capacity of sense and reason, tho' on death-bed, seeing the defender had accepted and bruiked by the disposition so qualified."

The question was determined in the same manner in a case very similar to the present, collected by *Fountainball* and *Forbes*, 8th February 1706, *Bertram contra Wier*, where the faculty was not limited to a certain sum. The case is abridged in the *Dictionary* in these words: " A father having disposed his estate to his son, with the burden of all provisions to his younger children, granted, or to be granted, and thereafter upon death-bed, having granted a bond of provision to one of his daughters, the Lords found this bond not reducible *ex capite lecti*, by the heir who had accepted the aforesaid disposition, and behoved to be liable to the burdens and qualities thereof."

It has been said by the pursuer, that from the cases collected by *Fountainball*, the *ratio decidendi* appears to have been, that the court understood the bond to have been of the same date with the disposition; but that is not the case, for the reason appears plainly to have been as in the other cases and authorities, that the heir having accepted of the disposition, and bruiked by that right, he cannot challenge a burden which has been imposed in conformity to his own right.

The

The defenders have one other authority to mention, which will be fully in the remembrance of the court ; it is the case between Lord *Forbes* and the children of his brother, where the question was, whether a bond of provision granted upon death-bed, in virtue of a reserved faculty in a contract of marriage, was good against the heir, who made up his titles by a service upon the contract. It is true, this court sustained the defence of death-bed, but the decree upon an appeal was reversed, and it was adjudged, " That the bond of provision in question having been granted in the execution of a faculty reserved in the contract of marriage, the exception of death-bed did not lie either against the principal sum, or the annualrents, or interest thereof."

Faculty
lection
p. 20
Dit. p.

In opposition to these authorities, the pursuer has appealed to a decision collected by *Stairs*, 25th of *February* 1663, *Hepburn* contra *Hepburn*, where a reserved faculty in a settlement of an estate by a marriage contract, was found not to be exerceable upon death-bed. And to another case, supposed to have been determined in *January* 1634, *Ballantine* contra *Ballantine*, but which does not appear in any written collection, and in which case it is said, that a father having taken a disposition to himself and his wife, in conjunct fee and liferent, and to his eldest son, with a faculty to burden and alter, a disposition afterwards granted by him, to the prejudice of his eldest son, was reduced *ex capite lecti*, notwithstanding of the faculty. But the judgment of the house of peers, in the case of Lord *Forbes*, is a sufficient answer to the first of those decisions ; and the plain answer to the second, and indeed to both, is, that they do not apply to the present case, because there was no acceptance on the part of the heir.

It has been said for the pursuer, " That even the consent of the heir, accepting of such deeds, will not be sufficient to authorize the father to do deeds to his prejudice in a manner the law does not permit." And, in support of this, three decisions have been appealed to ; two collected in the *Dictionary*, 13th *November* 1728, *Ridge* contra *Campbell* ; 4th *December* 1743, *Inglis* contra *Hamilton* ; and the third collected by *Falconer*, 15th of *December* 1744, *Irvine* contra *Irvines*.

Vol. 1.
p. 220.

Upon looking at those decisions, your Lordships will at once be satisfied, that they do not support the proposition intended by the pursuer to be supported by them, and that they are altogether foreign to the present question.

In

In the first it was found, that an heir portioner, who had accepted of a provision in lieu of all she could ask or crave through her father's decease, did not bar her from challenging deeds granted by her father on death bed.—In the second it was found, that an obligation, taken from the presumptive heir, not to quarrel deeds executed on death-bed, did not bar him from doing so.—And the third decision is precisely in terms with the first.

The second decision is the only one of the three which has the least relation to the present case, but can have no influence upon it; for tho' it is exceedingly just, that an obligation, taken from an heir, of purpose to defeat the law of death-bed, should be found ineffectual for that purpose, when the heir may not be at liberty to refuse his consent in such a case; yet from thence it can never follow, nor indeed with justice be argued, that the reserved faculty in Mr. *Pringle's* disposition, executed twelve years before his death, with no view to disappoint the law of death-bed, and voluntarily accepted of by the pursuer his heir, could not be exercised by him when on death-bed, by granting a provision to a child.—The defenders are sorry for the sake of the court, that they should be obliged to observe upon, or make answer to such decisions, which can only be quoted to mislead or perplex, when none better to answer the purpose can be found.

The authorities for the defenders are apposite and strong, and are impugned by none which hitherto have been appealed to by the pursuer; but, indeed, independent of all authorities, the plea of the defenders must stand good upon the principles of sound reason and plain sense, which seldom are repugnant to law. Mr. *Pringle* gave his estate to his son, under a quality, that he should be at liberty, at any time in his life, to burden it with such bonds of provision, debts or legacies, as he should think proper to grant: The pursuer accepted of the gift; and therefore, there can be nothing more consonant to reason and sound sense, than that he should be bound to pay that provision, which his father has imposed as a burden upon the estate.

The pursuer, despairing to maintain his reason of reduction upon the footing of the disposition 1748, has argued, that that disposition was rendered ineffectual by the disposition 1758, in so much, that his acceptance of the first disposition can have no effect, by reason of its being extinguished by the second.

This your Lordships will not much listen to; for the second disposition is clearly no more than an exercise of the powers reserved

pursuer's plea
founded upon
disposition
of 1758.

answer 1.

ved by the first as to one particular only, but is no extinction of the right ; on the contrary, it is a confirmation of it, so far as it conveys the estate to Mr. *Pringle* ; and the substitution of his younger sons in preference to the pursuer's daughters, with regard to that part of the estate not comprehended in the renunciation of the faculty, was no more than a rational exercise of the powers reserved to him.

When such faculties are reserved in dispositions of estates, neither law nor reason require any particular form or mode of exercising them ; all that is requisite, is to do it by a legal and complete deed ; and Mr. *Pringle* could not make the substitution he did in a more regular and proper manner, than by a disposition, as it must be effectual against the pursuer, who, by the conditions of his own right, is bound to implement every such deed.

But further, it will be observed, that the disposition 1758 reserves the same faculties to Mr. *Pringle*, and imposes the same obligation of performance upon the pursuer as the disposition 1748 did, and therefore the pursuer is plainly drove into this dilemma, that he must be bound in whatever way he conducts himself. If he accepts of the disposition 1758, he is clearly bound to pay the provision, because that is a quality in the deed. If he rejects that disposition, then it is good for nothing, and the disposition 1748 must subsist : So that in whatever view this matter is taken, the pursuer must be bound to pay ; for even upon his own plan of reasoning, he can never get rid of the disposition 1748, without accepting of the disposition 1758.

Answer 2.

The defenders know not well what is intended by the pursuer's insisting for reduction of the first codicil as executed on death-bed, because a moveable subject is only therein disposed of: It might be done on death-bed as well as at any other time. But however that may be, it is a good answer, that the codicil is proved to have been executed by Mr. *Pringle* when in *liege poustie*.

Answer to the pursuer's reason of reduction of the first codicil

The next question is, Whether Mr. *Pringle* has, and could, by the deeds executed by him, lay the burden of his moveable debts upon the pursuer, without his being intitled to relief out of the personal estate.

Second question to be considered is Whether Mr. Pringle could

The pursuer stands bound by the disposition 1748, which he has accepted of, to pay all debts which his father should be owing at the time of his death : But it has been argued for the pursuer, that when a father disposes his estate to his son, it imports only, that the son shall be liable to the creditors, but not that he shall

burden the pursuer with the debts in Scotland, and bar him from relief out of the personal estate? Answer

ether he
effectual-
one so ?
ument.

be cut off from his relief out of the moveable estate, if he shall be obliged to pay moveable debts ; and in support of this, two decisions were appealed to, collected by *Falconer*, 23d *January* 1745, *Ruffels* and *Greig* contra *Ruffel* and *Dall* ; and *June* the 12th 1747, *Campbells* contra *Campbell* of *Sherwine*.

The defenders admit the rule to be just in some cases, but not in all ; for they apprehend the import of such burdening clauses does entirely depend upon what has been the intention of the makers of such deeds ; and this appears clearly to have been the governing principle in the two decisions last above mentioned ; for it appeared to the court, that the burdening clauses were intended only as a security to creditors, without any design to cut off the relief : And this was particularly evident in the case, *Campbells* against *Campbell* of *Sherwine*, because the heritable estate was settled in one deed, and the moveable estate in another, upon different persons : And as each disponent was burdened with the payment of debts, the burdening clauses could admit of no other construction than their being only intended as a security to creditors, leaving the mutual claims of relief between the heir and executor, to be settled agreeable to the ordinary rules of law.

But the defenders cannot admit that it was *Mr. Pringle's* intention, even in the deed 1748, that the pursuer should have relief of personal debts ; many circumstances point out the reverse to have been his meaning. He had brought home the bulk of his fortune to pay for an estate which he had purchased ; and finding what he brought home not to be sufficient, he was obliged to borrow money in this country ; when, intending to return to *Spain*, and having the prospect of a second family of children, who, and their mother, he was bound to provide for, he executed the disposition 1748 ; wherein he gives his son his estate, burdened with all his debts. Under such circumstances, there is reason to think he could mean nothing else by the disposition 1748, than that his son should be bound to pay all his debts out of the land-estate ; reserving to himself his moveable estate, which he then had, or should acquire, to be settled and disposed of, for providing what other children he might have ; and that he should have it in his power to give them such other provisions out of his land-estate, as circumstances should make proper and necessary.

At the same time, it is immaterial whether your Lordships consider the disposition 1748 in this light, or not : For it is clear, that *Mr. Pringle* had it in his power, in consequence of the reserved

ved faculty, to burden the pursuer with the payment of his debts; and the defenders are advised, that he has done so in a manner effectual in law.

That Mr. *Pringle* had power to do so, your Lordships will be certain of, by perusing the clauses of the disposition 1748, already recited: And it is believed, that this will not be disputed, neither can it be disputed, that Mr. *Pringle* meant to do so; because the words of the will are express for that purpose: "I ordain
" that no part of the said debts shall affect this, my personal estate; and in case of any pursuit, demand and charge, brought
" against my said wife, she shall have immediate recourse against
" my said son, and shall be relieved of all such claims and
" bonds due by me in *Scotland*." Nothing can be more express.

It is indeed true, that, by the will, the *Spanish* debt is bequeathed to the pursuer in the way of consideration for this: But it is also true, that by the first codicil, that part of the will is altered, and every other part of it in express terms *confirmed*; so that, in the plain construction of both law and reason, the will and codicil taken together, do constitute and ascertain Mr. *Pringle's* ultimate resolution and settlement in this matter, amounting in substance to this, That his wife shall have the personal estate to be divided among his younger sons: That she shall have the *Spanish* debt to be divided amongst all his sons equally; and that the estate in *Scotland* shall bear the burden of the *Scots* debts, without any relief against his personal estate, as destined.

This is the clear import and intended effect of the will and first codicil; and as to the second codicil, it can have no influence in this question at all, as the only thing thereby intended, or done, was to give the pursuer a chance of being reimbursed out of the *Spanish* debt, of the burden brought upon him by the bond granted to *Mark* at that period.

But it still remains to be inquired into, whether Mr. *Pringle* has effectually executed what was clearly intended by him: And with regard to which, it has been argued, "That a father cannot
" by a testament prejudice his heir of his relief of the moveable
" debts: A testament is, in the construction of law, and with respect
" to the heir, a death-bed deed; and as the father cannot
" dispoise away the lands from his heir in testament, more than
" upon his death-bed, he can as little by such deed disappoint the
" heir of his relief of the debts, which in so far tends to burden
" and exhaust the heritage *pro tanto*."

The

The defenders may admit, that in ordinary cases no person can prejudice the heir by a testament of his relief of moveable debts; but they cannot admit, nor has any of our lawyers said, so far as they know, that a person may not burden his dispoinee by the exercise of reserved faculties in a testament, or testamentary deed: And with regard to the exercise of these, the defenders apprehend that there is nothing more necessary, than that the will of the person who is to exercise the reserved right, should be clearly declared in any deed whatever, formally and regularly executed.

By the late practice of the court, the maxim of the heir's not being to be hurt by testamentary deeds, has been much relaxed; and the will of an unlimited owner of an estate, when expressed in proper words, has been found, tho' in a testamentary deed, to affect the heir's right much more materially than is contended for by the defenders in the present case: For your Lordships have found, especially with regard to wills executed out of this country, that a man may even give his estate altogether from the heir, by a clause in a testament sufficiently expressing his will and intention, tho' not set forth in such proper legal words as are commonly used in formal settlements or dispositions of land estates, of which an example will by and by be given.

Mr. *Pringle*, in his will, has used legal, clear and explicate words, which most unquestionably would have been effectual for the purpose intended, if they had been put into any other writing than what is called a testament; but, as has already been observed, there is no reason or justice for the exercise of a faculty being limited to a writing of any particular form. Thus a man who disposes his estate, reserving a power to nominate heirs substitute to the dispoinee, may undoubtedly in his testament nominate such substitute heirs in virtue of the faculty reserved; which is a doctrine that your Lordships had occasion to have fully explained in the noted cause of *Douglas*.

And indeed, when your Lordships consider, that Mr. *Pringle* has reserved in the disposition 1748, full power to burden the estate with all gifts, legacies, &c. there appears to be nothing more consonant or agreeable to the nature of such a faculty, than the exercising of it in a testament.

Many cases have occurred where great effect has been given to deeds much more exceptionable in form, than occurs in the present case.

Thus

Thus, in the case, *Henderson contra Henderson*, 31st Januray 1667, collected by Lord Stairs: *Henderson* executed a writing, bearing the narrative of a testament, wherein he appointed *Allan Henderson* to be his heir and donator to all his lands and estate, and assigned him to the writs and evidents thereof, with power to enter with the superior. *Allan* pursued *Henderson's* apparent heir to implement this deed, by entering heir, and resigning in his favour, conform to the meaning thereof. The defender pleaded absovitior, 1st, Because this was no disposition, but a *testament*, or *donatio mortis causa*. 2dly, If held as a disposition, it is not done *habili modo*, by a proper conveyance. The court repelled the defence, because, tho' the writ was informal, yet they found the defunct's meaning was to alienate his right from his heirs to this pursuer. And indeed, if they had judged otherways, they would certainly have given too strong an effect to mere form, in opposition to substantial justice, and the right of every unlimited proprietor to settle his succession; which applies *a fortiori* to the present case, where the proprietor does not give away his estate from the heir, but only exercises a reserved faculty over his own estate, in a very moderate and rational manner, and for the provision of his younger children.

Another case was decided on similar considerations, 30th July 1722, *Kennedy contra Arbuthnot*. *Hugh Kennedy* of *Balterfon* made a disposition of his estate to his only son *John*, and the heirs of his body, to a blank person, and the disposition appeared to have been signed blank as to the substitution;—So that there only remained with the granter a tacite faculty to name substitutes, which was exercised in a manner which seemed to be less formal and exceptionable than the present case. By a simple docquet subjoined to the said deed, *Hugh Kennedy* of *Balterfon* declared, that he thereby gave full power and warrant to *William Ferguson* of *Auchinblain*, to insert *John Kennedy* of *Culzean* and his heirs; and failing of him, to Sir *Archibald Kennedy* of *Culzean*, and his heirs, in the above disposition.—It was pleaded against the heir of line, that the foresaid docquet was a legal declaration of *Hugh Kennedy's* intentions, that he should be substituted; and therefore, that the deed must be effectual against the heir of line.—The Lords found, that the docquet imported a substitution in favours of the person therein named, and the whole estate was carried from the heir of line.

Another case occurs still more recently, and which has been already hinted at in the preceeding part of the argument; it is that of *Simpson contra Barclay*, 11th December 1751: *Barclay*, owner of a land estate in *Scotland*, when in *South America*, executed a latter will and testament, wherein he "bequeathes to his father "*William Barclay*, all the yearly interest of his estate, whether in "money, goods, lands, cattle, or whatsoever else, owing or pertaining to him at the time of his death, either in *England*, *Scotland*, &c. for his sole use and behoof, during his natural life; "and after his death, he bequeathes the premiffes to his fister "*Jean Barclay* for her sole use and behoof, during her natural "life, and afterwards to her heirs for ever." Then he appoints executors, and bequeathes certain legacies; and concludes with this clause, "I do hereby revoke, annul and make void, all former wills, codicils or bequeaths made by me, and do declare "this only to be, and remain for, and as my last will and testament."

At a subsequent period, he annexed a codicil, or writing, in the following words: "I hereby declare, that the disposition which "I have granted in favour of my fister *Jean Barclay*, was made "with real intent, that she, the said *Jean Barclay*, after my father's and my death, no lawful heirs of my body surviving, "might take quiet possession, for her own use and her heirs, of "all lands, houses, sums of money, and all other effects whatsoever belonging to me."

A question having arisen about the effect of the deed, with regard to the succession of the estate in *Scotland*, the court, on report of the Lord *Elchies*, "Found, that tho' the said testament is not "effectual to convey the heritage, yet the declaration subjoined "to it, being a sufficient indication of the will of *Robert Barclay*, "that his whole estate should descend to the heirs therein mentioned, will afford ground of action to the heirs of *Jean Barclay* "against the pursuer, one of the heirs portioners of *Robert Barclay*, to denude of the said estate."

These cases have been adjudged, much more against the principles pleaded by the pursuer, than the present case can possibly be, when determined for the defenders: For Mr. *Pringle* has not only made a clear indication of his will, but has, by proper and apt words in his testament, exercised the faculty reserved to him, by expressly burdening the pursuer with his debts due in *Scotland*:

And

And the defenders shall only add one other authority in support of their plea, namely, Lord *Bankton*, who, in writing upon the rule in law, *nihil tam naturale est, quam eo genere quidque dissolvere quo colligatum est*, lays it down, that the exercising, by a testament, a faculty reserved in the disposition of lands, is not contrary to the rule.

The defenders have only further to observe, that the reason in law, why heritage cannot be conveyed by a testament, does not apply to this case. A testament, however long executed prior to the death of the testator, has only effect, as being his last will, and, therefore, is understood in law to be the deed of his last moments, as if then executed: And, of consequence, testaments cannot convey heritage, because they must ever be subject to the law of death-bed.

But the case is quite different, with regard to the exercise of faculties in dispositions, which the disponent has reserved a privilege of executing at any time in his life: For these may be executed on death-bed, as has already been proved, by the many authorities quoted in support of the bond of provision; and therefore, there is nothing more natural or proper, than that such faculties may be exercised in a testament, tho' understood to be made upon death-bed.

In the out-setting of this cause, some unguarded insinuations were made, to the prejudice of the defender Mrs. *Pringle*, touching her having influenced her husband in the execution of the deeds in question, which were answered in kind; and, since that, the proceedings have been carried on with coolness and discretion. In this information, all private history, not material to the matters at issue, has been avoided, and, it is hoped, the same rule will be observed in the information for the pursuer; but if otherways, and that reflexions shall be thrown out, she must be forgiven to put in a claim for having an opportunity to justify herself; and she does so, because she is certain, that she can prove and make clear, that her conduct toward the pursuer has been open and honourable, as well before, as after his father's death.

And with regard to the cause itself; as Mr. *Pringle* was an unlimited proprietor of his estate, under no legal obligation to the pursuer, or any other person whatever, with regard to the succession in it; as he disposed that estate to the pursuer, under an express reservation of a power to burden him with provisions to children,

children, or other debts, at any time in his life, and which the dis-
pensee becomes bound to pay; and as the pursuer did accept of
the disposition, it is humbly hoped your Lordships will be of o-
pinion, that the granting the bond of provision to *Mark*, and
the burdening the pursuer with the payment of the debts in *Scot-*
land, were proper acts of exertion of the faculty reserved to Mr.
Pringle; and that these things were done in a legal and effectual
manner; and therefore, that the defenders ought to be assoilzied
from this action.

In respect whereof, &c.

JA. MONTGOMERY.

CONDE-

CONDESCENDENCE for *Veronica Pringle*, relict of the deceast *Mark Pringle* of *Crichton*, and for *Robert, Andrew* and *Mark Pringles*, her children, defenders, given in to Lord *Coalyton*, the Ordinary;

A G A I N S T

John Pringle of *Crichton*, pursuer.

I N this action, your Lordships pronounced the following interlocutor; " Having considered the foregoing memorial, (*i. e.* the pursuer's memorial) memorial for the defenders, and additional memorials for the parties, before answer, ordains the defenders to give in a particular condescendence of the facts and circumstances, from which they infer that the pursuer had accepted of the disposition 1748, not only *quoad* the lands contained in the renunciation 1754, but also *quoad* the lands of *Crichton*; and ordains the pursuer, and Mr. *Mitchelson* his agent, to produce all letters which past between them and the deceast Mr. *Pringle*, relative to the infeftment which was taken upon the disposition 1748."

Mr. *Pringle*, the pursuer, and his doer, have produced some letters, and excerpts of others, in obedience to the above interlocutor, so far as respects them; and this condescendence is humbly offered for the defenders, in obedience to the other branch of the interlocutor.

Imo, In *Lammas* term 1751, a charter of resignation was expedited under the great seal, upon the disposition 1748, in favours of the pursuer, who thereafter was infeft upon the 23d *September* of that year, and his sasine duly registrate the day following; which acts, the defenders say, amount to a clear acceptance by the pursuer of the disposition 1748, because, from the following letters and excerpts produced by himself and his doer, it appears, that those things were done, not only with his knowledge and approbation, but at his desire and request.

Mark Pringle, in a letter to Mr. *Mitchelson*, dated at *St. Lucar*, 15th *June*, 1751, says, " Last post I had a letter from my son, whereby I find he is desirous to be infeft in as much as will give him a vote in the shire, which I am very willing to agree to. He tells me, the best way to save charges hereafter, is to be infeft

G

" in

“ in the whole estate, upon my disposition, I reserving revokable
 “ power, except to what barely will intitle him to have a vote:
 “ Not that I have any reason to suspect my son’s ingratitude, but
 “ at same time, I desire to shun giving him any temptation of
 “ running in debt, or bringing any manner of incumbrance on
 “ the estate, by such an infestment, as happily it may be preferable
 “ to my other provisions, legacies or donations I may think proper
 “ to make. Therefore I strictly request and desire, that you
 “ will not advise, nor enter into it, without laying every circumstance
 “ open to me, being a trust I repose in you: But, in case
 “ there be nothing in any shape detrimental to my present power
 “ over the estate of *Crichton*, by giving an infestment over the
 “ whole, as said, you may let him have it; and take out of the
 “ sealed packet I left with you, any paper that may be required,
 “ having Mr. *Andrew Pringle* and my son witnesses to the opening
 “ and sealing it again: The meanwhile, if there should any thing
 “ start contrary to my above intention, in such case, I desire that
 “ my son may be infest on the lands of *Sauchland*, which I presume
 “ may intitle him to the vote he requires.”

Mark Pringle, in a letter to the pursuer 10th *August* 1751, says,
 “ As to your infestment, did you ever consider the expence, trouble,
 “ and loss of time it would bring you to, by being called
 “ upon juries, &c.”

In *Mark Pringle’s* letter to Mr. *Mitchelson*, 23d *November* 1751, he says,
 “ As to infesting my son, please to suspend it until you
 “ hear from me.”

Mr. *Mitchelson*, in answer, 19th *December* 1751, writes, “ I had
 “ infest your son, that it might be before *Michaelmas*, as I wrote
 “ you the 10th *September*; but you see by Mr. *Ferguson’s* and Mr.
 “ *Pringle’s* opinion, you can revoke that when you will: You’ll
 “ see also, by their opinion, that it is necessary you renounce your
 “ power of revoking your liferent of a part of the land, to the
 “ extent of 400 *l. Scots* of valued rent, before he can be inrolled
 “ to vote: For which there will probably soon be occasion, as it
 “ is generally believed this parliament will soon be dissolved, and
 “ a new one chosen: I had made a draught of a paper for that
 “ purpose, but as you now speak of stopping your son’s infestment,
 “ I think it is not proper to trouble you till further orders.”

Mark Pringle, in a letter to Mr. *Mitchelson*, 23d *January* 1752, says,
 “ A dear article my son’s infestment, and I think to little
 “ purpose:—

“ purpose :—Pray was I not to sign some paper before that could
 “ be expedited ?”

In another letter to Mr. *Mitchelson*, dated 12th March 1754, he writes, “ I take this opportunity to return you my renunciation
 “ of liferent and faculty to my son, signed by me the 12th current, *David Hodge* my clerk, and *John Haldane* my servant,
 “ witnesses, of which I have a copy : And as to the contents, at
 “ present I find no objection, only let me intreat you, in the
 “ strictest friendship, to let it be extended so as to avoid all manner of dispute.”

There are other parts of the correspondence which relate to the same subject, but the above is the most material, and they clearly show, that the charter and infestment were expedited at the desire of the pursuer, and after obtaining his father's consent for that purpose, which the defenders believe to be a thing which the pursuer will not refuse or deny.

2do, The father's renunciation of his liferent, and faculties quoad a part of the estate spoke of in the last mentioned letter, is the strongest act of acceptance of the disposition, that possibly could be. The pursuer's charter comprehended the whole estate : He was infest in the whole estate, and how could he possibly take a renunciation of the father's liferent, &c. of a part without that being an acceptance of the disposition, which was the foundation of his title to that part ? The renunciation without the disposition 1748, could vest no right in the pursuer, and he could not accept of the disposition 1748 by halves ; nor can it have any influence in the question of acceptance, that the renunciation was made upon the occasion of the pursuer's marriage.—That might be argued upon, if the defenders were contending to have that part of the estate comprehended in the renunciation, subjected to the payment of their claims ; but that is not the case ; and there is no onerosity in the contract on the part of the son, whatever may be the case as to his Lady and children.

3tio, The pursuer, upon the title of the disposition 1748, and charter and sasine which followed thereon, was, anno 1755, enrolled as a freeholder of the county of *Mid-Lothian*, and thereafter acted as such.

4to, Altho' the defenders have no opportunity of knowing the acts of property that may have been exercised by the pursuer during his father's life, as fiar of the estate, yet there is reason to think from Mr. *Mitchelson's* letter, of 19th December 1751, that the pursuer
 had

had been in use of signing leases of the estate; for in that letter Mr. *Mitchelson* says, " *James Brockie's* tacks are ready wrote out; " but your son delays signing them till he gets a piece disputed " ground betwixt you and *Currie* divided, which he proposes to " do in the *Christmas* vacancy."

5to, The defenders have observed, that there was lately produced in a process between *Robert* and *James Turnbells*, respecting the reduction of an assignation to the tack of the farm of *Saugblana*, one of the farms of the estate, an agreement between Mr. *Pringle* the pursuer, and *Patrick Turnbull*, wherein Mr. *Pringle* agrees, " that the said *Patrick Turnbull* shall be allowed to continue in the possession of the grass, the last year of this new tack, " until the separation of the crop from the ground, or otherwise, in the option of the said *John Pringle*; the said *Patrick Turnbull*, and his successors, shall be allowed 40 *l. Sterling* out " of the last year's rent, which shall fall due by the new tack, " in consideration of the want of possession of the said grass." In this agreement, several other particulars are adjusted between the pursuer and the tenant, in which he appears clearly to have been acting as liar of that which is not comprehended in the renunciation.

3. This
ement is
oined.

6to, The charter and sasine which followed upon the disposition 1748, are the pursuer's titles founded on for carrying on the present action; for in the summons, the defenders are called to compare at the instance of " Our Lovit, *John Pringle* of *Crichton* " Esq; eldest lawful son of the deceased *Mark Pringle* of *Crichton*, " and as having good and undoubted right to the lands and barony of *Crichton*, lying within the parish of *Crichton* and shire " of *Edinburgh*, conform to charter under the Great Seal in his " favours, dated 26th *July* 1751, and instrument of sasine following thereon, duly registrate at *Edinburgh*, the " day " of *September* thereafter, to whose great hurt and prejudice, &c."

And as this summons is drawn by Mr. *Mitchelson*, the pursuer's doer, and who was his father's doer, and expedite the very charter upon the disposition 1748, and took the investment, and was well acquainted with the whole correspondence and transactions which past between the father and son, it puts it beyond all doubt that the pursuer not only accepted of the disposition 1748, but that he held and understood it to be his only title to the estate, until he, or rather his council, lately discovered that it would be for his interest not to admit such acceptance.

If

If your Lordships should think, that more evidence of the pursuer's acceptance of the disposition 1748 was necessary, it will be proper to order the pursuer to exhibit all tacks, and to condescend upon all writings that have been either executed or signed by him, relating to the estate, prior to, or after his father's death: But it is humbly imagined, that a further expiscation of the pursuer's acceptance of the disposition 1748 will not be thought necessary.

(Signed) JAS. MONTGOMERY.

16th February 1764.

ANSWERS for *John Pringle* of *Crichton*, Esq;

TO THE

CONDESCENDENCE offered for *Veronica Rennie*, Relict of *Mark Pringle* of *Crichton*, and her Children.

THE point in dispute between the parties, is, whether or not *John Pringle*, the pursuer, by accepting the disposition 1748, granted by his father, subjected himself to death-bed deeds that might be granted by his father, or gave his father any other powers over the estate, than if such disposition had never been granted? and if the taking charter and sasine upon that disposition in the father's own lifetime, could give the father any such powers?

The Lord Ordinary was pleased, by his interlocutor 24th January 1764, to ordain all letters which past relative to that matter to be produced, and they have been accordingly produced on the part of the pursuer; and as *Mark Pringle* regularly kept all letters he ever received upon business, and a copy book of all letters he wrote, all which are in the custody of the defender, the may produce any further letters concerning the same, if she can. Happily Mr. *Mitchelson* had kept all the letters he ever received from *Mark Pringle*.

From these letters it appears, that as *Mark Pringle* himself was abroad, *John Pringle* the pursuer, who believed himself to be his father's only son and heir, wished to have a vote in the county

H

where

where his estate lay, to make him the more considerable among his neighbours.

That might have been done, by giving him a superiority of a small part of the estate, a method which is often practised, but which is well known to perplex our land rights, and will probably hereafter be the subject of many disputes.

It occurred to be a much more simple way to pass a charter on the disposition and settlement which the father had executed before his going back to *Spain* in the year 1748; which was a deed sealed up and left in Mr. *Mitchelson's* custody, not to be opened till *Mark Pringle's* death, or until he should give orders to open it, and to put the pursuer in possession of lands, whereof the valued rent should amount to 400 *l. Scots*, which would still be within the sum then allowed him for aliment.

It occurred also, that as the estate of *Crichton* was a barony, if infeftment should be taken of part of it, that part would be disjoined from the barony, and could not again be well united to it, after the jurisdiction act: Besides, it would save the expence which would be occasioned by then taking a charter of part of the estate, and thereafter a charter of the remainder upon *John Pringle's* succession after his father's death. There only remained to ascertain, that *Mark Pringle's* powers should remain the same after that charter and infeftment as they did before. It was not meant or intended, that his powers should either be greater or lesser: This clearly appears by memorial and queries laid before two able lawyers, with their opinion thereon, as well as the whole correspondence of letters.

Thus in *Mark Pringle's* first letter on the subject, on the 15th June 1751, mentioned in the condescendence, page 2d and 3d, he says, "But in case there be nothing in any shape detrimental to my present power over the estate of *Crichton*, by giving an infeftment over the whole, as said, you may let him have it, &c."

Mr. *Mitchelson*, in his answer thereto, 25th July 1751, says, "As you put such a trust in me, with relation to infefting your son on your estate, I thought I could not sufficiently discharge it if I relied on my own opinion; for tho' it appeared pretty clear to me, that you would have still the same powers over the estate, after infefting your son, as you have at present; still I might be mistaken." Then adds, that he had taken the opinion of eminent lawyers thereon, who had concurred with him.

As Mr. *Pringle's* orders were positive to expedite the charter, in case his powers over the estate remained the same as formerly,
and

and as the lawyers opinions were clear upon that point, Mr. *Mitchelson* past the charter at the *Lammas* term 1751, so as that the infestment might be taken before the *Michaelmas*. But it appears from the whole strain of the correspondence, that nothing was meant or intended by either party, than that the son should have a vote, and the father's powers over the estate remain neither more or less than formerly; and that the inconveniency of splitting the barony, and the expence of two charters might be avoided.

To the *second* article of the condescendence it is answered, That the renunciation by the father of part of the estate, on his son's marriage, was no doubt accepted as to that part of the estate, because it was, indeed, a disposition for an onerous cause; but with regard to the remainder of the estate, there was nothing given, so consequently there could be no acceptance. The father's right remained the same as formerly: And this also answers the *third* article of the condescendence.

To the *fourth*. When *Mark Pringle* went to *Spain* again, he granted a factory, dated 28th *November* 1748, to Mr. *Mitchelson*, giving him full power to uplift the rents, and do all ordinary acts of administration by himself alone; but in case of granting of tacks, the factory requires him to have the consent of *John Pringle* his son, if in *Scotland*, and if furth thereof, the consent of *Robert Pringle* of *Clifton*, and Mr. *Andrew Pringle* Advocate, as appears by the factory produced. So that the acts of property were alone exercised by *Mark Pringle's* own factor; *John Pringle* only acted the part of a friend, giving his approbation, as the person likely to be best informed what was for the interest of the estate: And which approbation, if he had been absent, would have been given by the other gentlemen appointed.

To the *fifth*. The agreement mentioned is not produced; when it is produced it will easily explain itself; so nothing further shall be said thereon at present. N. B. Agreement was produced before a

To the *sixth*. It is taken notice of, that the charter and sasine on the disposition 1748, are the pursuer's titles for carrying on the present action. sing, and in process

To this it is answered, That homologation or acceptance requires an express deed of a party himself. It is not to be inferred from a mistake in one's doer: That would be catching hold on too trivial a circumstance. It is common to libel on an heritable title in reductions. The pursuer's doer imagined, that the reservations

vations in the disposition 1748 were never intended, nor could not give *Mark Pringle* any greater power over the estate than if such disposition had never been granted. He was suing for reduction of deeds granted on death-bed. These deeds had never been homologated, and it is submitted, if the disposition 1748 had been accepted of in the strongest terms, if it could give the father any greater powers over the estate than he had without it. But in this case, the disposition 1748 neither was, nor can be accepted of: The father reserved a power to alter: He did accordingly alter it *in totum*, by granting a new disposition in 1758, to a different series of heirs. It is not pretended that even that disposition, which is now the only subsisting deed granted by *Mark Pringle* the father, was ever accepted of. So that this part of the pursuer's libel, which mentions the charter and sasine, is inept, and of no avail in the present process, and falls to be struck out, as neither party can found thereon.

If the defenders want to see the tacks which have been granted since *Mark Pringle* went to *Spain*, they shall have access to them when they please: But it is believed, that after seeing the factory granted by *Mark Pringle*, now produced, they will be satisfied that the tacks cannot avail them.

PAT. MURRAY.

ADDITIONAL AGREEMENT between *John Pringle*, Esq; and *Patrick Turnbull*.

IT is agreed between *John Pringle* younger of *Crichton*, Esq; and *Patrick Turnbull* tenant in *Sauchland*, That whereas by the new tack of the lands of *Sauchland*, signed by *Patrick Turnbull* of this date, for the space of twenty one years, his entry to the grass is made to commence from the term of *Whitsunday* last, albeit by his former tack he is intitled to the possession of the said grass till the separation of this present crop from the ground; therefore the said *John Pringle* hereby agrees, that he, the said *Patrick Turnbull*, shall be allowed to continue in the possession of the said grass the last year of his said new tack, until the separation of that crop from the ground, or otherways, in the option of the said *John Pringle* and his successors. The said *Patrick Turnbull* and his successors shall be allowed forty pounds *sterling* out of the last year's rent,

rent, which shall fall due by the said new tack, in consideration of the want of the possession of the said grafs. And further it is agreed, That the new house to be built by the said *Patrick Turnbull*, shall be of the following dimensions, *viz.* Height within the walls thirty six feet; breadth within the walls twenty feet; height of the side walls from the floor seventeen feet; the rebbits, soles, and lintels of the door and windows to be of ash; the wind skews to be also ash; the roof and joisting to be of *Norway* fir, in so far as the timber in the old house shall not be sufficient; the walls to be of a proportionable thickness to the height; and the upper rooms are to be floored with new dales. And it is also agreed, that the road now leading from *Sauchland* to the high road, by *John French's* house, shall be stopt up, and that a new road for his conveniency shall be allowed in place thereof. And they oblige them to perform their respective parts of the premises to each other, under the penalty of twenty pounds *sterling*, attour performance; and they consent to the registration hereof in the books of session, or others competent, that letters of horning on six days, and other execution needful, may pass thereupon, in form as effects: And thereto they constitute

Their procurators.

In witness whereof, these presents, consisting of this and the preceeding page, are written by *Samuel Mitchelson* clerk to the signet, and subscribed by the saids parties, at *Crichton*, the seventh day of *June*, One thousand seven hundred and fifty seven; before these witnesses, *Peter Thomson*, servant to the said *John Pringle*, and the said *Samuel Mitchelson*.

(Signed) JOHN PRINGLE.

PATRICK TURNBULL.

Peter Thomson witness.

Samuel Mitchelson witness.



(Signed) John P. ...
PATRICK ...

John P. ...
Patrick ...